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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1356

MERLIN JAMES SMITH,

Petitioner,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

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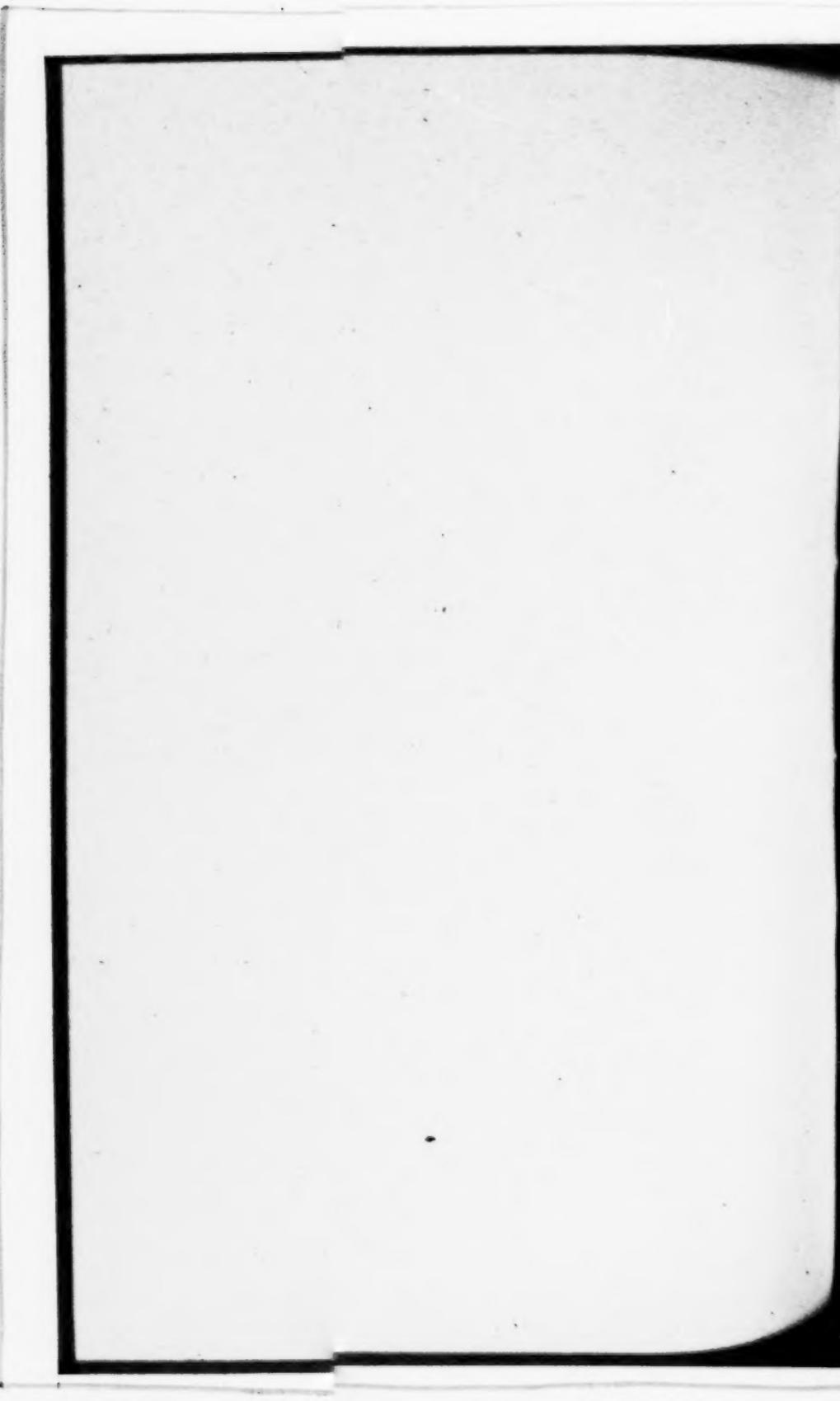
RESPONDENT'S BRIEF

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TOPICAL INDEX

	Page
STATEMENT OF CASE-----	2
ARGUMENT -----	3

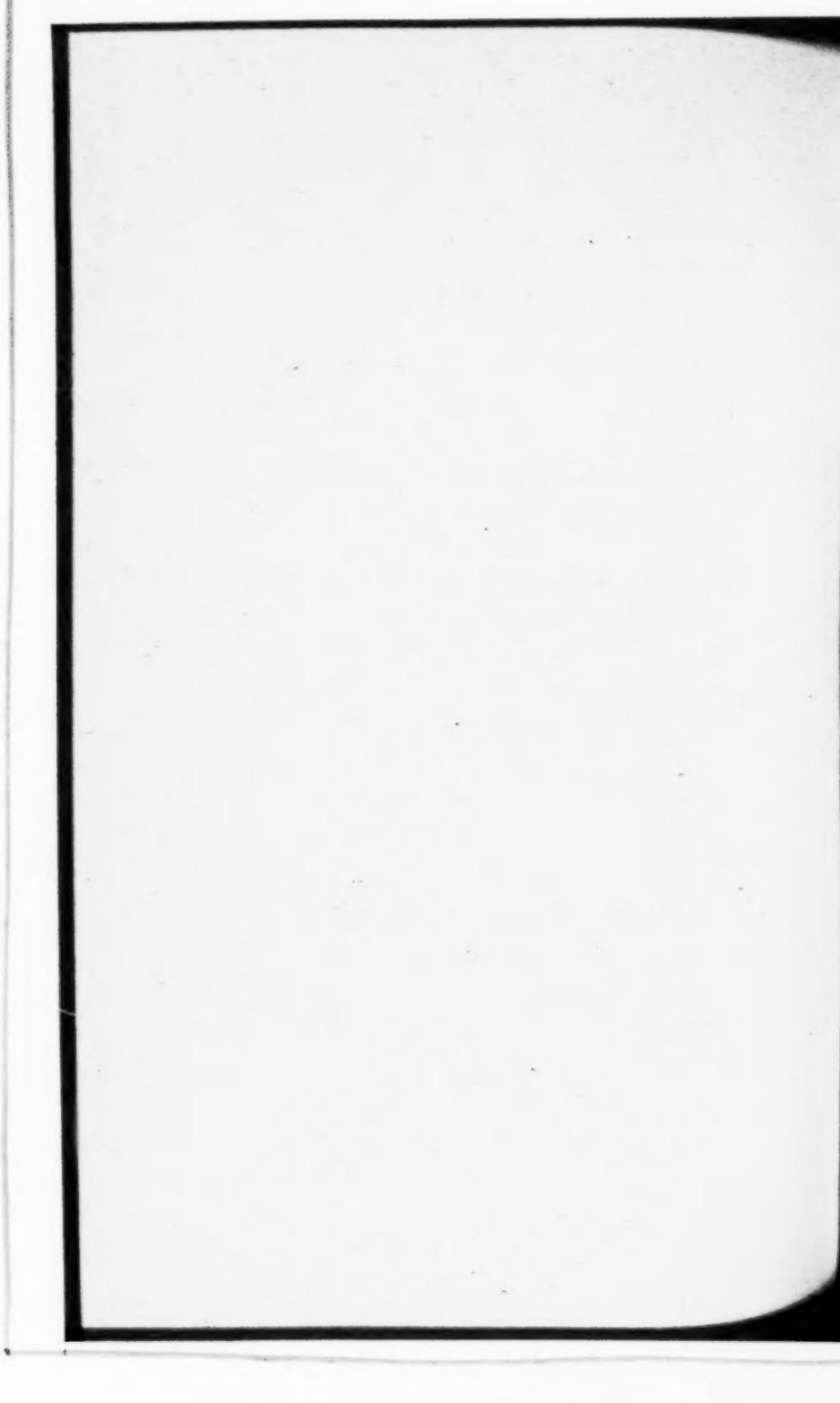
LIST OF AUTHORITIES CITED

CASES

Avery v. Alabama, 60 S. Ct. 321-----	3, 4, 7
Betts v. Brady, 62 S. Ct. 1252-----	3, 5
Frank v. Mangum, 35 S. Ct. 582-----	3
People v. Dorman, et al., 28 A. C. 882, 172 Pac. (2d) 686-----	2
People v. Dorman, et al., 72 A. C. A. 83, 164 Pac. (2d) 317-----	2
People v. Simpson, 31 Cal. App. (2d) 267-----	3, 6
Powell v. Alabama, 53 S. Ct. 55-----	3
Smith v. O'Grady, 61 S. Ct. 572-----	3, 5
In re Smith on Habeas Corpus, 29 A. C., minutes of February 10, 1947 -----	1
Thomas v. District of Columbia, 90 Fed. (2d) 424-----	3, 6

STATUTES

Constitution, United States, Fourteenth Amendment-----	2, 6
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RESPONDENT'S BRIEF

Petitioner seeks a review by this Honorable Court of an order made by the Supreme Court of the State of California denying his petition for a writ of habeas without rendering a written opinion. (*In re Smith on Habeas Corpus*, 29 A. C., minutes of February 10, 1947.) The ground asserted for his

present writ is that he was denied adequate time to prepare his defense with counsel of his choice, a right guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF CASE

Petitioner was tried and convicted of murder, robbery and kidnapping for the purpose of robbery and sentenced to life imprisonment. He appealed to the District Court of Appeal, Second District, Division 2, of the State of California, which reversed the murder conviction and affirmed as to robbery and kidnapping for the purpose of robbery. (*People v. Dorman, et al.*, 72 A. C. A. 83, 164 Pac. (2d) 317.) A hearing was granted by the Supreme Court of California which affirmed the convictions on all of said offenses. (*People v. Dorman, et al.*, 28 A. C. 882, 172 Pac. (2d) 686.) The opinion shows that the court carefully and fully considered the constitutional question now presented by petitioner for review by this honorable Court on certiorari. However, such review is not predicated upon the decision and judgment rendered by the Supreme Court of California on the appeal, but is sought upon a subsequent order of that court denying petitioner's application for a writ of habeas corpus which urged the same constitutional question.

It appears from the decision of the State Supreme Court rendered on the appeal that the indictment was presented on May 5, 1944; that on May 9th the trial court appointed the Public Defender as counsel for

petitioner and the trial was set for June 16th; that on June 14th petitioner made a motion to substitute James O. Warner as his attorney; that said motion was denied, the court permitting, however, said attorney to be an associate counsel with the Public Defender; that on June 16th a motion for continuance of the trial was denied, but by reason of the congested court calendar, the trial was postponed until Monday, June 19th; that on June 19th, when the case was called, the Public Defender asked to be relieved and his request was granted without objection at which time petitioner asked for a week's continuance, which was denied, and the trial proceeded, occupying eight days in the introduction of evidence and two days in argument.

ARGUMENT

Petitioner contends that he was denied a reasonable and fair opportunity to consult and prepare his defense with counsel of his choice in violation of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. In support of his contention he cites *Powell v. Alabama*, 287 U. S. 45; *Avery v. Alabama*, 308 U. S. 444; *Frank v. Mangum*, 237 U. S. 309; *Smith v. O'Grady*, 312 U. S. 329; *Betts v. Brady*, 316 U. S. 455; *People v. Simpson*, 31 Cal. App. (2d) 267; and *Thomas v. District of Columbia*, 90 Fed. (2d) 424.

In *Powell v. Alabama*, supra (53 S. Ct. 55), it appears that the defendants, negroes, were charged with rape committed upon two white girls; that the

trial court appointed all members of the bar for the purpose of arraigning the defendants with the anticipation that the members of the bar would continue to help the defendants if no counsel appeared; that six days after indictment the trials began and each of the three trials was completed within a single day and that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. It is stated at page 58, “* * * such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard.”

In *Avery v. Alabama*, supra (60 S. Ct. 321), the petitioner was arrested on March 21, 1938, arraigned on that day under an indictment for murder and his trial set for March 23d. The case was not reached on that day but called the 24th at which time his attorneys filed a motion for continuance on the ground that they had not had sufficient time and opportunity since their appointment to investigate and prepare his defense. The trial proceeded on the 24th, no ruling appearing in the record on the motion for continuance. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led the Supreme Court of the United States to grant certiorari. After reviewing the record the court concluded that petitioner had not been denied the benefit of assistance of counsel and affirmed the judgment of the Supreme Court of Alabama.

The case of *Frank v. Mangum*, supra (35 S. Ct. 582), was an appeal from a federal district court to review a decree denying a petition for a writ of habeas corpus in behalf of a person in custody under a conviction of crime in a state court. The matters involved were alleged disorder in and about the courtroom and defendant's absence from the courtroom at the time verdict was rendered. It was held that he had been convicted and was in custody under due process of law within the meaning of the Constitution.

In *Smith v. O'Grady*, supra (61 S. Ct. 572), on certiorari to review a judgment of the Supreme Court of Nebraska affirming a judgment dismissing an application for a writ of habeas corpus, it appears that the application charged that he, an ignorant layman not represented by counsel, was tricked into pleading guilty to a serious offense. It was held that "These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests." (P. 574.) The cause was reversed and remanded.

In *Betts v. Brady*, supra (62 S. Ct. 1252), the petitioner was indicted in the Circuit Court of Carroll County, Maryland, for robbery. At his arraignment he requested that counsel be appointed for him due to lack of funds to employ counsel. His request was denied. He pleaded not guilty and elected to be tried without a jury. Witnesses were summoned in his behalf which he examined and he cross-examined the State's witnesses. He did not take the witness stand

although afforded the opportunity to do so. The judge found him guilty and imposed a sentence of eight years. The question presented on certiorari was whether in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State. It was held at page 1262 that,

"As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

The judgment was affirmed.

In *People v. Simpson*, supra, 31 Cal. App. (2d) 267, the defendant was forced to trial without counsel and the judgments of conviction of robbery and assault with a deadly weapon were reversed. The court, at page 272, said, " * * * If convictions are to be upheld by reviewing courts the trial judges must see that defendants are accorded fair trials."

In *Thomas v. District of Columbia*, supra (90 Fed. (2d) 424), the judgment was reversed. The opinion shows that the trial court refused to receive further evidence or hear argument by counsel. It was stated

(page 428) that the hearing accorded defendants was not fair and impartial in the constitutional sense.

Obviously none of the above authorities cited by petitioner furnishes a sufficient reason for the issuance of a writ of certiorari in the instant cause. More than 40 days elapsed from the time of the indictment to the day of his trial. He was accorded paid counsel by the State who served him until relieved by substitution of other counsel on the day of the trial. So far the Fourteenth Amendment has not been construed to guarantee a continuance of the trial upon request of the accused in order that new counsel selected by him may have further time to prepare his defense. The nearest approach to this matter is *Avery v. Alabama*, supra, where the defendant was forced to trial within four days of his arrest and arraignment on the charge of murder. Even under such circumstances, the judgment of the lower court was affirmed because a review of the record showed that defendant's appointed counsel performed their full duty intelligently and well not only in the trial court but, in conjunction with counsel later employed, carried an appeal to the State Supreme Court and contested every step of the way leading to final disposition of the case.

On the appeal in the case at bar the Supreme Court of California said (172 P. (2d) 686, at page 690):

*** * Here the trial did not commence until at least the seventh day after employment of private counsel, and appointed counsel, who had

the preparation of the case for more than a month, remained to render assistance until the trial started. The conduct of the defense was full and fair. The fact that 33 witnesses testified for the People and only three in addition to the defendants appeared in support of the defense does not necessarily show lack of time for preparation. Considering the rights of the state as well as of the defendant, the time allowed for preparation was not unreasonable. The record discloses that the defendant was ably and energetically represented by counsel of his choice. Representation was not a mere formality, but was representation in fact. None of the defendant's substantial rights was denied him by the action of the trial judge in refusing to grant a further continuance when the case was finally called for trial."

Wherefore, respondent urges a denial of the petition for a writ of certiorari.

Respectfully submitted.

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